Testimony on HB 6128
Before the House Oversight, Elections & Ethics Committee
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of
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Mr. Chairman and Members of the Committee:

Back on April 22, 2004, I testified on HB 5741, before the then House Local Government and Urban Affairs Committee. That bill was Chairman Ward's first attempt to regulate issue advocacy ads under the Michigan Campaign Finance Act.

My testimony back in 2004 focused on giving the Committee Members a brief history of issue ads and attempts at state regulation here in Michigan from 1995 through the 2002 elections.

I also discussed with the Committee the impact on State Campaign Finance Laws of the U.S. Supreme Court's 2003 decision in McConnell v. FEC which upheld the constitutionality of the Bipartisan Campaign Reform Act (BCRA), commonly referred to as McCain-Feingold or Shays-Meehan the law's legislative sponsors.

BCRA contains restrictions on issue ads in federal elections.

Back in 2004, in my previous testimony I criticized HB 5741 for omitting the other important component of the federal BCRA package those provisions which restrict federal office holders, federal candidates and national political party committees and their officers and agents from soliciting or receiving soft money. I pointed out that under that 2004 bill a Michigan political party could collect soft money and trade it nationally for hard dollars, often times at a discount in those states whose state law permits state and local candidates to accept corporate, labor union or tribal contributions. A Michigan political party would then be free to use those traded-for hard dollars from out-of-state individuals in the 60 day blackout period imposed on electioneering communication under the bill.

First, let me note the new "Section 40" contained in HB 6128 is a good effort at preventing the laundering of soft money for hard dollars to be used in the 30/60 day blackout periods that this bill provides for.

That said, the remainder of my testimony is cautionary. It expresses my view that this bill, if enacted, is likely unconstitutional.

Why do I say that? McConnell v. FEC was decided on a narrow 5 – 4 vote. The swing vote in that case, Sandra Day O'Connor is now retired and Justice Samuel Alito, her replacement, voted with the majority in the Vermont campaign finance case decided earlier this week. A case that some observers say effectively reinvigorates application of the First Amendment to the campaign finance law.

Another electioneering communication case is today in the pipeline, Wisconsin Right to Life v. FEC. The Supreme Court may hear, perhaps as early as next term an "as applied" challenge to the issue ad restrictions of BCRA. McConnell's 5 – 4 majority may quickly flip the other way.

BCRA is much more limited than HB 6128. HB 6128 restricts all communications: print, direct mail, e-mail and internet, door to door canvassers, billboards, telephone calls, radio, TV, cable and satellite during the blackout period, whereas, BCRA's restrictions apply narrowly only to cable, satellite and broadcast advertising. Under BCRA, for the restrictions to apply, the communication must be specifically targeted to so many in a candidate's constituency. In contrast, under HB 6128, it doesn't matter the geography of the communications only its referral to a candidate. BCRA also exempts certain ideological corporations from the restrictions on electioneering communication. HB 6128 does not. It appears that HB 6128 fails the test of "narrow tailoring." All this makes HB 6128 highly susceptible to legal challenge. Even if HB 6128 could survive strict scrutiny analysis in federal court there is ample evidence that its greatest challenge would be in Michigan's Court system.

Let me explain. Protections afforded by the Michigan Constitution may be greater, lesser, or the same as those afforded by the U.S. Constitution. Under the supremacy clause of the U.S. Constitution, Michigan Courts must enforce rights conferred by the U.S. Supreme Court even if the state constitution does not provide such rights. But, what if, the Michigan Constitution affords greater rights than those found in the U.S. Constitution?

HB 6128 might be constitutional under the 1st and 14th Amendments of the U.S. Constitution, but HB 6128 may not be constitutional under Article I, Section 5 of the Michigan Constitution. Let me illustrate this point by use of the following example. In 1990 the U.S. Supreme Court upheld the constitutionality of sobriety check lanes conducted in Michigan, saying those check lanes did not violate the search and seizure clause of the 4th Amendment of the U.S. Constitution. However, in 1993, the Michigan Supreme court in Sitz v. Michigan Department of State Police ruled those same sobriety check lanes unconstitutional as a violation of Article I, Section 11 of the Michigan Constitution which contains in its text an express prohibition against warrant less, suspicion less searches for the purpose of a criminal investigation.

Returning to HB 6128, although the bill may not offend the 1st and 14th Amendments of the U.S. Constitution; even if HB 6128 may be compatible with the U.S. Supreme Court's ruling in McConnell v. FEC; like with the Sitz case, the Michigan Constitution employs different language and perhaps a higher standard than that found in the U.S. Constitution.

Article I, Section 5 reads as follows:
Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press (Emphasis added).

This legislation would ban the speech of such persons as corporations, labor unions and Indian tribes during certain black out periods. That ban applies, not because the speech

expressly advocates the nomination or election of a candidate, rather because that speech merely refers to a candidate.

The current majority on the Michigan Supreme Court is often times referred to as textualists. That majority believes that a plain reading of the text of a contract, the text of a statute, the text of the constitution matters.

Back in 2001 the Michigan Supreme Court examined the text of Article II, Section 9 which reads, in part, as follows:

"The power of referendum does not extend to acts making appropriations for state institutions . . ."

In Michigan United Conservation Clubs v. Secretary of State the issue before the Michigan Supreme Court was whether an act passed the legislature, which modified the standard for the issuance of concealed weapon permits and also contained an appropriation of $1,000,000 to the Department of State Police to implement the new law was subject to referendum? The textual majority on the Supreme Court held the new law was not subject to referendum, because the law appropriated funds to the Department of State Police, a state institution.

Will a majority on the Michigan Supreme Court ignore the plain reading of Article I, Section 5 and uphold the constitutionality of a law that bans communication by certain persons because their speech merely refers to a candidate? I think they will not.

Let me note for the record that I enthusiastically support the six other bills in the package before the Committee today.

MICHIGAN CONSTITUTION OF 1963

Article I

Declaration of Rights

§5 Freedom of speech and of press.

Section 5. Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.